



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 18, 1995

Mr. Allan G. Little
Director, Business Enterprises Program
Texas Commission for the Blind
P.O. Box 12866
Austin, Texas 78711

OR95-641

Dear Mr. Little:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 33483.

The Texas Commission for the Blind (the "commission") received a request for nine categories of documents relating to the commission's agreements with Cantu Services, Inc. ("Cantu Services"), a list of blind licensees that are eligible to compete for a certain contract, and rules and regulations promulgated by the commission. We understand that the commission has released some of the requested information to the requestor. However, you claim that portions of the requested information are excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You have also submitted documents to this office for review. Additionally, we have received arguments from Cantu Services as to why some of the submitted documents should not be released.

After the commission made its original request for a determination from this office as to whether the submitted information was excepted from required public disclosure, the commission informed this office that the requestor's client filed a lawsuit against the commission, Pat D. Westbrook, the commission's director, and you, the director of the commission's Business Enterprise Program, concerning the contract for the vending services at Lackland Air Force Base. The commission claims that, due to a change of circumstances, section 552.103(a) also excepts the submitted information from required public disclosure. We have considered the exceptions you and Cantu Services have claimed and have reviewed the documents at issue.

Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Open Records Decision No. 551 (1990)* at 4. The commission must meet both prongs of this test for information to be excepted under 552.103(a).

Although the commission did not originally claim that the requested documents were excepted from required public disclosure under section 552.103(a), the commission has informed us that, at the time of the request, it had no reason to believe that litigation was contemplated by the requestor's client. After the request was submitted to this office, the commission was sued by the requestor on behalf of his client. We believe that the commission has shown a change in circumstances after the request was originally filed with this office that will justify the commission being able to now claim an exception under section 552.103(a).

You state that litigation has been filed against the commission based on the contract for the vending services at Lackland Air Force Base. You have also submitted a copy of the petition in that lawsuit. We have reviewed the documents and conclude that they are related to the litigation. Therefore, the commission may withhold the submitted information. We note that when the opposing party in the litigation sees or has access to any of the information in these records, there will be no justification for withholding that information from the requestor pursuant to section 552.103(a). *Open Records Decision Nos. 349 (1982), 320 (1982)*. In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. *Attorney General Opinion MW-575 (1982)*; *Open Records Decision No. 350 (1982)*.¹

¹As we have concluded that section 552.103(a) excepts the information from disclosure, we need not address your discretionary section 552.104 claim.

We address the section 552.110 claim in the event litigation ends without the documents being disclosed to the requestor through the discovery process. Section 552.110 excepts from disclosure:

A trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. . . .

Section 552.110 is divided into two parts: (1) trade secrets and (2) commercial or financial information. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). There are six factors listed by the Restatement which should be considered when determining whether information is a trade secret:

(1) the extent to which the information is known outside of [the company's] business; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and to [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. The governmental body or the company whose records are at issue must make a prima facie case for exception as a trade secret under section 552.110. See Open Records Decision No. 552 (1990) at 5.

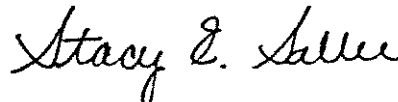
Cantu Services claims that the Agreement between Cantu Services and the Blind Vendor/Manager "constitutes confidential commercial and financial information developed by and solely for the use of Cantu Services, Inc. in its competitive efforts to market its Consulting Services." Cantu Services also claims that release of the agreement and all letters and facsimile correspondence between a lawyer for the commission and Cantu Services, which Cantu Services claims deals with the details of the agreement, "could cause Cantu Services, Inc. substantial competitive harm." Cantu Services points out that the agreement contains a provision that restricts use of the form and substance of the agreement.

First, governmental bodies may not enter into agreements to keep information confidential except where specifically authorized to do so by statute. Open Records Decision Nos. 514 (1988), 444 (1986), 425 (1985). Therefore, Cantu Services' argument that the agreement itself sets out restrictions on the use of the agreement cannot form a basis to except the agreement from disclosure. Secondly, Cantu Services has not made a prima facie case that the agreement and documents relating to the agreement are trade secrets. Other than stating that Cantu Services was the sole developer of the information and that release of the information could cause Cantu Services "substantial competitive harm," Cantu Services does not attempt to meet the six criteria set out above. Therefore, we conclude that, upon the conclusion of the litigation, Cantu Services may not withhold this information under the first part of section 552.110.

The commission and Cantu Services also assert that a portion of the submitted information is "commercial or financial information" subject to exception under section 552.110. To fall within the second part of section 552.110, the information must be made confidential by a statute or judicial decision. Open Records Decision No. 592 (1991) at 6. As neither the commission nor Cantu Services has demonstrated that a statute or judicial decision excepts this information from disclosure, we conclude that this information is not excepted by the second part of section 552.110 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Government Section

SES/KHG/rho

Ref.: ID# 33483

Enclosures: Submitted documents

cc: Mr. Christopher Solop
Ott & Purdy
Security Centre South, Suite 1100
200 South Lamar Street
Jackson, Mississippi 39201
(w/o enclosures)

Mr. Donald E. Barnhill
East & Barnhill
Texas Bank North
13750 San Pedro Avenue, Suite 700
San Antonio, Texas 78232-4309
(w/o enclosures)

Mr. Ricardo M. Cantu
Chairman of the Board and CEO
Cantu Services, Inc.
P.O. Box 428
Burkburnett, Texas 76354
(w/o enclosures)

Mr. Joe H. Thrash
Assistant Attorney General
Office of the Attorney General
General Counsel Division
P.O. Box 12548
Austin, Texas 78711-2548
(w/o enclosures)